No. 2692.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR A. KLINE,
Appellant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION, a Corporation, THE ARIZONA TRUST COMPANY, a Corporation, and SIMS ELY, as Receiver of the Arizona Mutual Savings and Loan Association and as Receiver of the Arizona Trust Company,
Appellees.

BRIEF OF APPELLEES.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

GEORGE J. STONEMAN,
Attorney for Appellees,
Phoenix, Arizona.

Bower Co., Phoenix

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BRIEF OF APPELLEES.

To the brief and argument filed in support of this appeal, Sims Ely, for himself, and as Receiver of The Arizona Trust Company and The Arizona Mutual Savings and Loan Association, appellees herein, respectfully submits the following:

ARGUMENT AND AUTHORITIES:

This is an action growing out of the status of the mortgages given by stockholders of The Arizona Mu-

tual Savings and Loan Association to this Association as security for loans made by it to them as stockholders and to which appellant, claiming to be the innocent purchaser thereof for value, sets up the legal and equitable title.

Appellant Kline was, at the time of the transaction had by him with the officers of The Arizona Trust Company, a stockholder of The Arizona Mutual Savings and Loan Association; he was not, on March 1st, 1912, even the owner of shares which had matured (*Transcript of Record, Fols.* 72-73); on the contrary, having heard rumors of the proposed purchase by The Arizona Trust Company of the stock and assets of the Loan Association; in fact, having been called upon by a representative of the Trust Company, who, at this time, was also an officer of the Loan Association, and having at such time, by said officer, been solicited to exchange the shares of stock in the Loan Association for shares of stock in the Trust Company, (*Transcript of Record, Fol.* 77) and, as he says, being hard up for money, he came to Phoenix, for the purpose of arranging some plan under which he could withdraw from the Loan Association and receive some cash for his unmatured stock therein. At this time, Kline was, as is shown by the record, a good business man, accustomed to dealing in large affairs, and it must be presumed with the ability, and having the means at his command, of ascertaining the condition of the Loan Association, in which he was a stockholder, not only in so far as such conditions might affect its solvency, but also and perhaps of more importance, with the ability and means to form a relia-

ble estimate as to whether the Loan Association, solvent or otherwise, could, through its officers, who, in turn had organized a new company, transfer the assets of its stockholders to such new company.

On March 2nd, 1912, when the arrangement between Kline and the officers of the Loan Association and Trust Company was, as he says, consummated, the Loan Association was insolvent; this was determined in the suit of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, out of which arose the proceedings entitled,

In Re Dennett et al, decided in this court February 15th, 1915; 221 Fed. 350;

And in the case of,

Farmers' & Merchants' Bank vs. The Arizona Mutual Savings and Loan Association et al, 220 Fed., Page 1.

The former case was an application by Dennett for a writ of mandamus and prohibition directed against Honorable William H. Sawtelle, Judge of the United States District Court for the District of Arizona, calling in question the jurisdiction of respondent in that case to enter a decree in the case of Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, et al, after the expiration of the term during which the decree was entered on February 27th, 1913.

In the statement of facts, this court, in the case of "In Re Dennett, et al, supra" used the following language:

"Clark complains that the Loan Association is insolvent but that the officers and directors thereof had failed and neglected to dissolve the corporation, to liquidate its obligations or to wind out its business and distribute its assets."

And further that:

"Without the knowledge or consent of complainant, and many others similarly situated, such officers and directors entered into a corrupt and fraudulent agreement with certain persons, whose names are unknown, whereby it was agreed and understood that the Trust Company should be organized for the purpose of taking over the assets of the Loan Association. * * * * That, accordingly, in the latter part of April, or first of May, 1911, the Loan Association proceeded to sell, assign,transfer and set over to the Trust Company all its said assets, notes and mortgages and other securities of every kind and character, since which time the Trust Company has exercised exclusive control and dominion over and has dealt with such assets and securities as its own property; and that the Loan Association or its officers and directors, or a majority of its stockholders, were possessed of no right, power or authority so to convey or dispose of the assets of the Association. * * * * The complainant prays that the transactions complained against be annulled; that a restitution of the assets of the Loan Association be had and an accounting taken."

In the opinion of this court, after stating the facts, the court, speaking through Joudge Wolverton, said:

"The manifest theory and purpose of the original bill is and was first to redress a wrong done by the Loan Association, its stockholders participating therein and its directors and officers in fraudulently and without legal or rightful authority transferring

its assets and property to the Trust Company; and secondly, to wind out the affairs of the Loan Association; it being alleged that it was insolvent and disabled from continuing the business for which it was organized and incorporated. Very naturally, the first relief was to recover back the properties that had gone into the hands of the Trust Company fraudulently.''

It has thus by the two cases above cited been adjudged that on and prior to the 12th day of March, 1912, the Loan Association was insolvent and that its attempted transfer of assets to the Trust Company was without legal or rightful authority.

We submit the decree entered in the trial court in this cause should be affirmed, for the reasons:

First:—That the attempted transfer by The Arizona Mutual Savings and Loan Association of its assets to The Arizona Trust Company has been by a court having jurisdiction of the subject matter declared to be void.

Second.—That on March 2nd, 1912, appellant was a stockholder and the owner of unmatured stock in The Arizona Mutual Savings and Loan Association, which Association was, on that date, insolvent.

Third.—That, on March 2nd, 1912, appellant knew, or should have known, and is charged with the notice which he might have acquired that the Loan Association in which he was a stockholder was insolvent.

Fourth.—That, under these conditions, to sustain the claim made by appellant of his legal and equitable

title to the mortgages in dispute would be to prefer appellant as the owner of unmatured stock in an insolvent corporation, to other stockholders and to permit him by indirection to change his status as a stockholder in such insolvent corporation to that of a creditor.

On July 15th, 1912, a suit was commenced in the United States Court for the District of Arizona, entitled "Charles W. Clark vs. The Arizona Mutual Savings and Loan Association, et al"; and, on March 12th, 1914, a final decree was entered in said suit, modifying a decree theretofore made on February 27th, 1913, in which final decree,

> "It is ordered that all properties and assets of every kind and description which were transferred to the Trust Company by the Loan Association be restored to said Loan Association or the Receiver for said Loan Association; that all contracts, conveyances or agreements, which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled."

The effect of the decision is, as appears from (*Transcript of Record, Fol.* 84) that the attempted transfer of the assets was and is void according to the terms both of the decree of February 27th, 1913, and March 12th, 1914. This language was, upon appeal to this Circuit affirmed in the case of Farmers & Merchants' Bank, appellant, vs. The The Arizona Mutual Savings and Loan Association, appellee, in which the following language is used in affirming the decree of March 12th, 1914:

"We find no error for which the decree of March 12th, 1914, should be reversed; in that decree the rights of the appellant are fully protected and provision is made for the presentation of its claims to the Master in Chancery to be paid out of the availa- the funds which may remain in the Trust Company. *Provision is also made therein for the ascertainment and recovery of assets in the hands of persons nyt party to tho suit.*" (ITALICS OURS).

The decree which is thus affirmed recited:

"That all contracts, conveyances or agreements made by the Loan Association, or its agents or officers, be vcated and annulled; that the Trust Company transfer and deliver to the Receiver all property received by it from the use and investment or other disposition of the stock and assets of the Loan Association."

It is also in the decree above mentioned declared that The Arizona Mutual Savings and Loan Association, at the time of the attempted transfer of its assets and exchange of its shares to The Arizona Trust Company in 1911, was insolvent; if then appellant was, on March 2nd, 1912, a stockholder of the Loan Association, which on that date was insolvent, and if, because of its insolvency, he could not withdraw and change his status to that of a creditor holding securities and assets of the Association, in which he was a stockholder, he is entitled to no other or greater relief in this or any other action than would be that of any other stockholder in such insolvent corporation.

Moreover, he had actual notice of the pendency of the suit at the time when he claimed to have changed his status from that of a stockholder to creditor (*Trans-*

cript of Record, Fol. 78) and he could have ascertained by the most casual inquiry that the litigated questions involved in that proceeding directly affected his claim as a creditor either of the Loan Association or the Trust Company with the right, had he felt so disposed, to intervene.

As a stockholder of the Arizona Mutual, appellant had behind his stock as security only the assets of the Arizona Mutual. It may be conceded that he had a perfect right to sell his stock in the Mutual to the Arizona Trust Company, which he did; it does not, however, follow that, as a stockholder in the Mutual and without reference to whether, at that time, his company was insolvent, he could create for himself any greater or further interest in the Mutual by selling his stock to The Arizona Trust Company than such as he had as a stockholder in the Mutual. This is precisely what Kline did. Not only is this true but, as appears from the record, he knew the Mutual was, at the time he sold his stock to the Arizona Trust Company, without sufficient funds to mature his stock, (*Transcript of Record, Fols.* 72-77-78).

He was a bookkeeper and accountant (*Fol.* 72) and yet upon his own admission, especially for the purpose of determining his status as a stockholder in the Mutual, he asked Olsen, the Secretary, to show him the books and contented himself with looking over the stockbook, (*Fol.* 72). He knew then, or when Olsen, the Secretary, showed him the books, he could and should have ascertained the conditions as to the solvency of this company. If it was solvent, he would not have

wanted to sell his stock or, so desiring, would have been able to sell his stock for much more than he received for it. If it was insolvent, then, upon the authorities submitted in this brief, he had no right to withdraw as a stockholder. As such stockholder in the Mutual, he had a proportionate interest in its assets; if he sold his stock to the Trust Company, he then is charged with notice that the transaction, not being upon a cash basis, imposed upon him the burden of determining the value of the securities pledged by the Trust Company for the payment of the purchase price of his stock, and yet the record discloses that with knowledge that the officers of the Mutual Savings and Loan Association were also officers of The Arizona Trust Company, and, in that dual capacity, were taking from the shareholders of the Loan Association assets properly belonging to them, without further investigation, he now assumes to base his title to the mortgages in question, because of the fact that he asked Edwards and Le Baron in their capacity as officers of the Trust Company whether they had good title to the securities, which, as officers of the Loan Association, they transferred to their new company. (*Fols.* 74-75-76-77).

Appellant held this stock, by his own statement, from March 2nd, 1912, without setting up a claim to it, until July 13th, 1914, and, during all this time and after he had heard from Mr. Smith, who was in charge of the Arizona Trust Company, that there was talk about an action against the Trust Company and the Savings and Loan Association (*Fol.* 78), and covering the period when the suit of Charles W. Clark was being tried, in-

volving the ownership of the various securities, a part of which Appellant now claims, he sat idly by and permitted a decree to be entered in the Clark suit, determining that the attempted transfer of these very assets by the Loan Association to the Trust Company was fraudulent and void.

The responsibility for these actions is attempted to be evaded by him through his statement that, as a stockholder in the Trust Company, he was not bound by the decree because not party to the suit, and that he was an innocent purchaser for value.

It must also be remembered that these notes and mortgages, to which appellant now asserts title, had not even been by him reduced to possession. For these reasons, we submit that Kline is subrogated to such rights only as the stockholders of the Mutual may have in the assets upon the final winding up of the affairs of these two companies in the hands of the Master and Receiver, and that, if any of these stockholders, who executed the notes now claimed to be the property of Kline as collateral payment for the notes given by the Arizona Trust Company, are indebted to the Mutual, they must pay their debts and out of the surplus after the payment of debts, if any remains, they would be entitled to their pro-rata share of the distribution of such assets to this extent only. Should the notes be paid, Kline, if he had retained his status as a stockholder in the Mutual, would be permitted to share in the proceeds.

Authorities.

It seems to be generally held that the right to withdraw and receive what has been paid exists only where

the association is a going concern and cannot be exercised where the association is, at the time, known to be insolvent, for the condition of solvency is incompatible with the right of any member to withdraw his contribution to the general fund until the proper proportion of the losses has been ascertained and adjusted.

Aldrich v. Gray, 147 Fed. 454; 77 C. C. A. 597; 8 Ann. Cas. 832;
Pacific Coast Sav. Soc. v. Sturdevant, 165 Cal. 687; 133 Pac. 485; 49 L. R. A. (N. S.) 1142 and note;
Rabbitt v. Wilcoxen, 103 Ia. 35; 72 N. W. 306; 64 A. S. R. 152; 38 L. R. A. 183;
Wilcoxen v. Smith, 107 Ia. 555; 78 N. W. 217; 70 A. S. R. 220.

"It being ascertained that the association is in fact insolvent, a withdrawing member has the right only to a pro-rata share in the distribution of the assets."

Colin v. Wellford, 102 Va. 581; 46 S. E. 780.

"The fact that a withdrawing member believed the association to be solvent when he gave his notice cannot entitle him to more than his just proportionate part of the funds if the association is in fact insolvent."

Pacific Coast Sav. Soc. vs. Sturdevant, 165 Cal. 687; 133 Pac. 485; 49 L. R. A. (N. S.) 1143 note.

Aldrich vs. Gray, 147 Fed. 453, Ann. cases, Vol. 8, 833 (note),

was a case where defendant Gray bought stock in a building and loan association and within a short time, having satisfied himself that the affairs of the association were in a bad condition, withdrew and was re-paid

to the full extent of his stock subscriptions and a Receiver was appointed with directions to take possession of the assets and to bring such suits as were necessary for their recovery, and it was held:

"With respect to the course taken by him (Gray) to effect his withdrawal, it is to be observed that his relations with the other stockholders of his class were mutual and no one more than another was responsible for the misfeasances and neglect of duty by the officers of the association, and a serious question arises whether he could avail himself of their desertion of their duties as a sufficient reason for his neglect to take such steps as would enable him to give his written notice of withdrawal to the board of directors. The statute evidently devolves upon the board the exercise of certain duties for the protection of other stockholders, and the action of the board is made a condition of the right to withdraw. But, if it were held that, in the circumstances stated in regard to the method of conducting the corporate affairs, the intervention of the board was not absolutely essential, still if the conditions were such that Scripps was not entitled to withdraw, so that if the board were present to act upon his notice the withdrawal could not have been lawfully permitted, the question of the sufficiency of his method of procedure becomes immaterial. For in such case, the essential conditions of his right did not exist."

Quoting further:

"The current of decisions in this country in regard to this subject seems to be that, when insolvency supervenes in the status of such associations, the right of withdrawal which before existed is suspended, in the absence of some express provision to the contrary. This is the result of the mutuality of the stockholders and the equity of equality, which is

of the essence of their relation to each other. If it were otherwise, and the stockholders could at will successively take their investments out and desert the failing enterprise, those remaining would have to bear the brunt of the joint misfortune."
Citing cases.

This decision is by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Severens.

It may be conceded that the facts of this case are not on all fours with the case at bar, but the principle therein laid down is fully applicable in that Kline, being the owner of unmatured shares in an insolvent loan association, attempted to withdraw and, failing in this, sought to accomplish the same end by exchanging his stock for the assets of the insolvent Mutual Loan Association, of which he was a withdrawing member; and so, we say, that, even had it not been decided by the District Court of Arizona (which decision has been approved by this Circuit Court) that the Trust Company had no right to the assets to which appellant sets up his claim, he would still be unable to assert this right under the principle laid down in the case of Aldrich vs. Gray, supra.

On pages 11 and 12, Brief of Appellant, Revised Statutes, 1901, Paragraph 3333 is quoted, for the purpose of defining that a holder in due course is a holder who has taken the instrument under the following conditions:

First: That the instrument is complete and regular upon its face.

Second: That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.

Third: That he took it in good faith and for value.

Fourth: THAT, AT THE TIME IT WAS NEGOTIATED TO HIM HE HAD NO NOTICE OF ANY INFIRMITY IN THE INSTRUMENT OR DEFECT IN THE TITLE OF THE PERSON NEGOTIATING IT.

We believe the facts in this case demonstrate that appellant was not a holder in due course in that not only did he not accept in good faith the securities to which he now asserts title, but that he actually had notice of the infirmity in the instrument and defect in the title of the Arizona Trust Company.

Without repeating what has already been said, the record shows that with the books of the co rporation submitted to him upon his request, he chose to make no inspection of any records, except the stock-transfer book and assumed the right to rely upon the statements of Olsen and Edwards, particularly laying stress upon the fact that, when he consulted these men, he consulted them as officers of the Trust Company; and, while knowing they were also officers of the Loan Association, assumed the further right to rely upon their statement made as officers of the Trust Company, that they had good title; he would have this court believe that, under these conditions, he could effect a withdrawal as a stockholder from the insolvent Loan Association and bind the remaining stockholders by the statement of these faith-

less officers speaking in this behalf in the capacity of officers of a company organized to loot and rob the treasury of the Loan Association.

As was said in the case of Aldrich vs. Gray, supra, he, as a stockholder of the Loan Association, was as much responsibility for the very acts for which he now attempts to evade responsibility as were the officers themselves.

As appears from the (*Transcript of Record, Fol.* 72), Kline was told in the latter part of February, 1912, by the Secretary of the Mutual Savings and Loan Association that, on account of the mismanagement of some of the officers, his stock would not mature; and, in the latter part of 1911, (*Fol.* 77) he was advised by Edwards and LeBaron, even then officers both of the Mutual Savings and Loan Association and Arizona Trust Company, that they were contemplating the merging of the assets of the Mutual Loan Association with the Arizona Trust Company and he was requested to exchange his shares of the Arizona Mutual for the same amount of shares of the Arizona Trust Company. At this time, Kline told these men that he did not want to change his shares Upon this information, Kline came to Phoenix and discovered by inquiries that, because the examiner had withdrawn and thrown out a certain amount of loans, the value of all stock had been reduced so that it would not mature. Whereupon, Kline did not wait until it matured but took immediate steps to withdraw the money, which, as a stockholder, he had paid in upon his stock.

Kline was a bookkeeper and a business man; in a matter of this importance to him, it became necessary, and we submit the obligation was placed upon him, to determine whether or not upon the proposal made by LeBaron, Edwards and Olsen to purchase his stock, giving as security for the note of the Arizona Trust Company the assets of the Loan Association, the Loan Association could legally so dispose of its assets; and whether the Trust Company, by the purchase of shares, could become a stockholder in the Loan Association or could, as stockholder, have a voice in the disposition of its assets or management of its affairs. If, as a matter of law, the Arizona Trust Company could not do this, Kline, as an individual dealing with the Trust Company for his own protection, was charged with notice of this want of power.

In the case of *Standard Savings & Loan Association* vs.*Aldrich,* decided in the Sixth Circuit Court of Appeals, speaking through Mr. Justice Lurton, the question arose upon the right of the Michigan Savings and Loan Association to loan money to the Standard Savings & Loan Association and to take from the latter as security for the loan certain real estate mortgages made to it by borrowing members. It was held in this case that:

> "The Michigan Association had no power to become a shareholder in the Standard Association * *; the objects of such association being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of the other, nor

could it lend its own funds, except to its own members, for the purpose indicated." Citing,

Thomps Bldg. & L. Asso., 2d ed. p. 215, par. 114; 4 Am. & Eng. Enc. Law, 2d ed. p. 1028;
Kadish v. Garden City Equitable Loan & Bldg. Asso. 151, Ill. 531; 42 Am. St. Rep. 256, 38 N. E. 236;
North America Bldg. Asso. v. Sutton, 35 Pa. 463; 78 Am. Dec. 349;
Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co., 24 Conn. 159.

Further:

"The withdrawal of a shareholder is the withdrawal of capital pledged primarily to creditors and to carry on the business for which the association was organized. The funds applicable, therefore, to the payment of withdrawing shareholders is the fund arising from the current contributions of a solvent and going association; and no other funds can be legitimately so applied. * * * * We conclude, therefore, that no authority existed, express or implied, to borrow money to meet the claims of withdrawing shareholders. Such a borrowing would not be for the purpose of paying debts and liabilities in due course of business. Appellants, as we have before stated, had notice that the borrowing was for the payment of withdrawing shareholders, and are constructively charged with knowledge that the managers were acting without power in so doing and in assigning the mortgages of borrowing shareholders to secure the loan. A contract beyond the scope of the power of the Michigan association, express or implied, cannot be enforced by an appeal to the rules of estoppel. Any such application of the doctrine would be, in effect, to enlarge the power of the corporation in accordance with the discretion of its managers, violating thereby the rights of innocent shareholders and a sound public policy." Citing,

Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 60, 35 L. ed. 68, 11 Sup. Ct. Rep. 478;
Pittsburgh C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 389, 33 L. ed. 157, 163, 9 Sup. Ct. Rep. 770;
Miller v. American Mut. Acci. Ins. Co., 92 Tenn. 167, 176, 20 L. R. A. 765, 21 S. W. 39;
McCormick v. Market Nat. Bank, 165, U. S. 538 549, 41 L. ed. 817, 821, 17 Sup. Ct. Rep. 433;
Re National Permanent Ben. Bldg. Soc., L. R. 5, Ch. 309;
California Nat. Bank v. Kennedy, 167 U. S. 363, 368, 42 L. ed. 198, 200. 17 Sup. Ct. Rep. 831.

Further quoting from this opinion and applying the principle to the situation existing in that case, it is held:

"The claim that petitioner can recover for money had and received on the ground that the Michigan Association has had the benefit of money and *ex aequo et bono* should repay it cannot be maintained upon these facts. The only persons who received benefits were the withdrawing members of the Michigan who were not entitled to it. As the payments, instead of being beneficial to the association, hastened its failure and diminished its resources by reducing its membership and giving withdrawing members what they had no right to receive, when they had no funds in the treasury; this was the first necessary effect of such payments. Its second was the wrong done to the remaining members whose share in its assets is by so much less because of what was paid to withdrawing members. THE THIRD AND NECESSARY EFFECT, AND THAT SCARCELY THE LESS INJURIOUS THAN THE FIRST, IS THAT, IF THE CLAIM OF PETITIONER IS SUSTAINED, AND IT IS GIVEN THE STATUS OF A CREDITOR, THE MEMBERS' RIGHTS IN THE ASSETS OF THE MICHIGAN ASSOCIATION ARE SUBORDINATED TO PETITIONER,

AND THEY CAN SHARE ONLY IN THE ASSETS, IF ANY THERE BE REMAINING AFTER PETITIONER'S CLAIM IS PAID."

Standard Savings & Loan Association vs. Aldrich, 89 C. C. A. 646; 163 Fed. 216, with note, same case 20 L. R. A. (N. S.) 393.

The case of *Standard Savings & Loan Association vs. Aldrich,* supra, is peculiarly applicable to the facts in the case at bar in that, as in that case, Kline knew that the Loan Association had no money which it could rightfully use to pay off matured stock; he knew that, for this reason, his stock had not matured; he knew that this was caused by the mismanagement of the Loan Association by its officers; he knew that the Trust Company was attempting to buy the stock and did buy his stock in the insolvent Loan Association, and he knew the notes offered to him as collateral for the note given by the Trust Company to secure the purchase price of his stock were given by stockholders of the Loan Association and were assets of the Loan Association and,

"He was constructively charged with knowledge that the managers of the Loan Association were without power in so doing and in assigning the mortgages of borrowing stockholders to himself to secure the same, which he now claims to be due from the Loan Association."

The only difference between these two cases is that in the one, the Michigan Association lent its money and, in the case at bar, Kline loaned to the Trust Company his stock.

By the decree in the case of *Charles W. Clark vs. The Arizona Mutual Savings and Loan Association and The Arizona Trust Company,* above cited, the Trust Company was without power to receive from Kline his stock of the Loan Association in exchange for stock of the Trust Company nor to divert its assets.

For the convenience of the court, the decree of March 12th, 1914, is appended to this brief.

If Kline now insists, under these conditions, upon remaining a stockholder in the Trust Company, he is entitled, under the decree of the Clark suit, to such assets as may be found by the Master and Receiver to be properly assets of the Trust Company; he might have had the right and it was his privilege to disavow the contract made with the Trust Company and remain a stockholder in the Loan Association, which status he rightfully should assume; and, so far as the stockholders of the Loan Association are concerned, is compelled to assume to the end that as is the rule established in the cases above cited, he shall be compelled to share in the hazards of this venture and as a stockholder in the Loan Association be denied preference over other stockholders.

We respectfully submit that, for the reasons and upon the authorities herein submitted, the decree of the lower court should be affirmed and the Receiver be permitted to reduce these mortgages to cash as a part of

the assets in his hands for distribution among the stockholders of the insolvent Loan Association.

Respectfully submitted,

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Service of three copies admitted, Feb. 9, 1916.

ERNEST W. LEWIS,
THOS. ARMSTRONG,
Solicitors for Appellant.

DECREE (March 12, 1914).

The bill in this cause was filed by a stockholder of the Arizona Mutual Savings and Loan Association on behalf of himself and all other stockholders who might desire to come in and join in the suit. Its fundamental equity is the wrongful transfer of assets of the Loan Association to the Trust Company and the fundamental relief prayed for is the restitution of the assets of the Loan Association to that corporation, to be distributed to its stockholders on its dissolution by order of the Court.

The answers of both the Loan Association and Trust Company show the circumstances of the transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution.

The various intervening petitions filed prior to the decree in this cause contain in each a prayer "that the transaction therein set forth as made between the said Loan Association and the said Trust Company may be declared to be annulled and of no force and effect, and that a restitution of all the assets of the defendant Loan Association from the defendant Trust Company be adjudged and decreed; that an accounting between both of the defendants above named be had and taken; that the Court appoint a Master to take proof of the facts alleged in the bill and to determine the rights and equities of all the parties concerned herein, and that the effects of the Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." In neither the original bill nor in any intervening petition is there any prayer for a confirmation of the title of the Trust Company or that the Court should vest the title of the property in that company.

In all the pleadings the relief sought is based on the legal and equitable rights of the Loan Association to

have a complete restitution of its assets and to have its assets marshalled and distributed to those found to be entitled thereto.

It is too clear to admit of argument that the assets of the insolvent corporation after the payment of its just debts are to be distributed equally amongst its stockholders and that the Court has no warrant of law to make any other disposition of them as between the stockholders. There is no order in this case giving notice to the stockholders to present their claims to the assets of the company or to show their interest in its property.

The decree entered herein on the 27th day of February, A. D. 1913, without such notice and opportunity being afforded and without referring the case to a Master, as prayed in the bill, to determine the rights and equities of all parties concerned, is that said stockholders mentioned in the decree shall receive all they have paid in, not their proportionate share of the assets of the Loan Association and by this means these particular stockholders are relieved of all participation in any losses of the Loan Association and are given a lien upon said assets to the exclusion of ther stockholders.

It is fundamental that where a judgment or decree has been made which is responsive to the pleadings and in the due course of the lawful jurisdiction of the Court, such decree is beyond the power of the Court to modify or change after the adjournment of the term at which it is rendered, but it does not follow that because this is so that the Court may not set aside or modify a judgment which is not of such a character. In order to render the judgment or decree a finality, the emphatic requirement is that it must be responsive to the matters litigated, and in consonance with the legal relief to which the facts averred show the parties to be entitled.

The question is, has the Court jurisdiction to the extent claimed: and to constitute this there are four essentials:

First: The Court must have cognizance of the class of cases to which the one adjudged belongs.

Second: The proper parties must be present.

Third: The point decided must be in substance and effect within the issues.

Fourth: The Court must have proceeded after having acquired jurisdiction of the case "according to established modes governing the class to which the case belongs."

A Court must not go outside of its appointed sphere and it is impossible to concede that because A. and B. are parties to a suit, that the Court has the right or power to decide or determine any matter in which they are interested whether the matter is involved in the pending litigation or not. A judgment on the matter outside the issues is of necessity altogether unjust because it concludes a point upon which the parties have not been heard. In order to make a judgment conclusive not only the proper parties must be present, but the Court must act on the property according to the rights which appear on the record.

It is the opinion of the Court that the decree of February 27th, 1913, which attempts to vest the title of the assets of the Loan Association in the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer.

I am likewise of the opinion that the Court exceeded its powers on the pleadings and proof before it when it gave a lien to the intervening creditors on the assets of the Loan Association in the hands of the Trust Company for the amount they had paid in and compelled the parties who were interested in the assets of the Loan Association to bear all the losses incurred by the Loan Association in the conduct of its business.

IT IS THEREFORE ORDERED that the decree of the 27th day of February, A. D. 1913, be and the same is hereby modified as follows:

IT IS ORDERED that all the properties and assets of every kind and description which were transferred to the Trust Company by the Loan Association, be restored to the said Loan Association, or the receiver for said Loan Association, and that all contracts, conveyances or agreements which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled.

IT IS FURTHER ORDERED that the Trust Company transfer and deliver to the receiver in this cause, all property of every kind received by it, its officers or agents, from or on account of the transfer of the said assets of the said Loan Association or received by it from the use and investment or other disposition of any moneys or other property of the said Loan Association.

IT IS FURTHER ORDERED that this cause be referred to Edwin F. Jones, Standing Master of this Court, to state the account between the Loan Association and the Trust Company and to that end he shall hear testimony and may examine and inspect all papers on file in this Court or in the hands or possession of the receiver in this cause.

IT IS FURTHER ORDERED that the said Standing Master ascertain and report the exact amount due by said Loan Association to each of its stockholders, and in order to do so he is directed to publish a notice in some newspaper in the City of Phoenix for at least five times, requiring all persons claiming to be stockholders in said Loan Association to file their claim, with proof thereof, within thirty (30) days from the first publication of such notice, and that he send by mail to each of the stockholders of said Loan Association a copy of such notice.

IT IS FURTHER ORDERED that the said Standing Master report on the priorities or equities of all

persons claiming to be interested in the property of the said Loan Association and the order in which same are to be paid out of the assets of the said Loan Association.

IT IS FURTHER ORDERED that the Master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit and whether or not the same can be recovered from the parties to whom they were transferred.

IT IS FURTHER ORDERED that the Master ascertain and report what sum of money or other assets of the said Loan Association were unlawfully used by any officer or agent of either the Loan Association or Trust Company, and whether same or any part thereof can be recovered from said parties or their transferees.

IT IS FURTHER ORDERED that the demurrers to the petitions now on file seeking intervention, be and the same are overruled and that the petitioning parties mentioned in the petition of July 15th, 1913, be allowed to intervene in this cause and present their claims to the Master for adjudication in accordance with this decree.

IT IS FURTHER ORDERED that Sims Ely, the receiver in this cause, be appointed general receiver herein, with all proper powers and that he hold all of the assets and property now in his hands belonging to either of said corporations until the further order of this Court.

All other questions are reserved until the coming in of the report of the Master.

DONE IN OPEN COURT this 12th day of March, A. D. 1914.

(Signed) Wm. H. SAWTELLE,
Judge.